Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

AUSTIN HUTCHINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether subjecting a Defendant to disparaging cross-examination, requiring him to characterize the truthfulness of the trial prosecutor, and other Government witnesses, denies Defendant of a fair trial, requiring a reversal of Defendant's conviction?

2. Whether the Circuit Court erred in failing to remand for re-sentencing when the District Court failed to properly perceive its judicially recognized power to downwardly depart for extraordinary family circumstances?

3. Whether the District Court lacks the power to downwardly depart to impose a lesser penal sentence to reflect Defendant's cooperation, solely because the Government declines to move under Sentencing Guideline § 5K1.1?

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Petitioner Austin Hutchinson respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit affirming his convictions for conspiracy to transport stolen goods in interstate commerce, in violation of 18 U.S.C. § 371 (1 count), engaging in monetary transactions with criminally derived property in violation of 18 U.S.C. §§ 1957(a), and 2 (4 counts); contempt of Court in violation of 18 U.S.C. §§ 401(3), 3147, and 2 (1 count); contempt of Court in violation of 18 U.S.C. §§ 401(3), 3148(a), and 2 (1 count); obstruction of Grand Jury investigation in violation of 18 U.S.C. §§ 1503, 3147, and 2 (1 count); and submitting false documents to the Government in violation of 18 U.S.C § 1001 (2 counts); and sentencing him to the custody of the Attorney General for a term of 57 months to be followed by a 2-year term of supervised release, and the payment of restitution in the sum of $4,481,350.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is dated May 13, 1999. (Appendix A). The judgment of the District Court for the Southern District of New York is dated November 19, 1998. (Appendix B).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit denying Petitioner's motion for rehearing and rehearing en banc, was rendered on June 23, 1999. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code Section 2 states:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 United States Code Section 371 states:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such a conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 United States Code Section 401(3) states:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt or its authority, and none other, as —
>
> > (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Title 18 United States Code Section 1001 states:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully —
>
> > (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> >
> > (2) makes any material false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title or imprisoned not more than 5 years or both.
>
> (b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings, or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to —

> (1) administrative matters, including claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
>
> (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission, or office of the Congress, consistent with applicable rules of the House or Senate.

Title 18 United States Code Section 1503 states:

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United Sates magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of

his being or having been such juror, or injuries any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, of by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is —

(1) in the case of a killing, the punishment provided in sections 1111 and 1112

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, fine under this title, or both.

Title 18 United States Code Section 1957(a) states:

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b) (1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to proved the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are —

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined by section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority if the Secretary if the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of Treasury, the Postal Service, and the Attorney General.

(f) As used in this section —

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956 (c)(4)(B) of this title, but such term

> does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;
>
> (2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and
>
> (3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

18 U.S.C. § 3147 states:

> A person convicted of an offense committed while release under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to —
>
> (1) a term of imprisonment of not more than ten years if the offense is a felony; or
>
> (2) a term of imprisonment of not more than one year if the offense was a misdemeanor.
>
> A term of imprisonment impose under this section shall be consecutive to any other sentence of imprisonment.

Title 18 United States Code Section 3148(a) states:

> (a) **Available sanctions.** — A person who has been released under section 3142 of this title and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

Title 18 United States Code Section 3742(f)(1) states:

> **(f) Decision and Disposition**
>
> If the Court of Appeals determines that the sentence —
>
> > (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
>
> * * *

United States Sentencing Guideline Section 5H1.6 states:

> Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.
>
> Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

United States Sentencing Guideline Section 5K1.1 states:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

United States Sentencing Guidelines Section 5K2.0 states:

> Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent a departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

Where for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree of substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not meat that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon had been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor at sentencing under one of these other guidelines, the court may depart for this reason.

> Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to any unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

STATEMENT OF THE CASE

A. Proceedings in the District Court

Petitioner, Austin Hutchinson was indicted by a Southern District of New York Grand Jury for conspiracy to transport stolen goods in interstate commerce (18 U.S.C. § 371), engaging in monetary transactions with criminally derived property (18 U.S.C. § 1957(a)), submitting false documents to the Government (18 U.S.C § 1001), and obstruction of Grand Jury investigation (18 U.S.C. § 1503) in connection with the unauthorized wiring of funds from a co-conspirator's employer to Petitioner's accounts for use in a future Jamaican hotel project. He was later charged in a superseding indictment with contempt of Court (18 U.S.C. § 401(3)) for making an unapproved trip to Jamaica.

The money at issue was transferred from various Young and Rubicam ("Y&R") accounts, a Manhattan advertising agency, at which Cornel McIntyre ("McIntyre"), a cooperating witness, worked, into Petitioner's accounts. The money was to be used for future Jamaican real estate investments, including hotel construction.

Petitioner testified on his own behalf. On cross-examination, the Government engaged in a pattern of questioning, compelling Petitioner to opine that law enforcement officers, and other witnesses, were either "mistaken" or "lying." The following are the questions the Government asked, and the responses Petitioner was compelled to give:

> Q: What about Seaman's Furniture Company, who were those checks written for? (591).[1]
>
> A: I know not for me. (591).
>
> Q: ***If an FBI agent came in here and said you had told him that those were expenses for you, that wouldn't be right?*** (591).
>
> A: That's correct. (591).
>
> * * *
>
> Q: What about New York Building Products, was that for you or Mr. Graham or Mr. McIntyre? (592).
>
> A: I know it is not for me sir. (592).
>
> Q: ***If an FBI agent came in here and said that you told him it was for you, that would be wrong?*** (592).
>
> A: Yes. (592).
>
> * * *

1. Parenthetical references are to the trial transcript.

Q: What about Celini Furniture for $23,000? (592).

A: Not mine. (592).

Q: ***If someone from Celini Furniture came here and said he delivered furniture to your house, you would be surprised?*** (592).

A: I would. (592).

* * *

Q: The check to Marcia Buchanan for $20,000, I take it, did he [McIntyre] tell you he wanted you to write that check? (594).

A: From my recollection on that check, he asked me to give Ms. Buchanan a certified check for a loan, I think for a loan. (594).

* * *

Q: But it is safe to say it is not your personal loan? (595).

A: Yes. (595).

* * *

Q: ***If someone came in here and said that they had asked you to write the check to Marcia Buchanan for $20,000 because you owed them $20,000, that would surprise you?*** (595).

A: Yes. (595).

* * *

Q: What about PC Richards, was that for you or Mr. Graham or Mr. McIntyre. (590).

A: I remember writing checks. I don't remember if it was going Mr. Graham or Mr. McIntyre, but I know it wasn't me. (590).

* * *

Q: ***If you sat down with the FBI and told them those checks to PC Richards were from you, that would be wrong?*** (590).

A: Yes. (590).

* * *

Q: He [McIntyre] told you to buy materials in the United States? (594).

A: No. He is going to buy material; not me, sir. (594).

Q: ***If you had told the FBI that Graham's responsibility was to buy materials to send to Jamaica, that would not be right?*** (594).

A: I don't recall that. (594).

* * *

Q: ***If you had told the FBI that you had kept records but you had lost them, that would be wrong?*** (602).

A: I don't recall telling the FBI that. (602).

* * *

Q: ***If I were to show you that money wasn't the same money as what you gave to Jacqueline Hewitt, I would be wrong, right?*** (617-618).

A: Yes, sir. (617).

* * *

Q: You never told Agent Matthews you had a bachelor's degree from Pace College, for example? (565).

A: Not that I recall. (565).

Q: ***If Agent Matthews were to say that, that wouldn't be true, right?*** (565).

A: I don't remember talking to Agent Matthews about that. (565).

Q: You would be? (592).

A: Yes? (592).

With respect to the conspiracy count, Petitioner contended that although the Government proved that money was stolen from Y & R, and the money was wired into Petitioner's accounts, Petitioner did not act with fraudulent intent. With respect to the contempt charges, Petitioner claimed he was unaware that it was a violation of law to travel to Jamaica, after his release on bond.

With respect to the transfer of funds, Defendant argued that the Government did not prove this charge beyond a reasonable doubt, but rather proved that some suspicion existed that it could have been Petitioner who transferred the funds. The Rule 29 motion was denied.

1. *The Verdict*

Petitioner was acquitted of Counts Two through Seven, but was convicted on Count One, and on Counts Eight through Nineteen (772-773).

2. *The Sentence*

Following the verdict, a pre-sentence investigation (P.S.I.) report was prepared. Paragraph 87 of the P.S.I. suggested a base offense level of 17, utilizing Guideline Section 2S1.2 (Engaging in Monetary Transaction in Property Derived from Specified Unlawful Activity); a two-level increase, pursuant to Section 2S1.2(b)(1)(B) ("awareness" that the funds were the proceeds of specified unlawful activity) (Par. 88); a three-level increase, pursuant to Section 2S1.2(b)(2) (value of the funds exceeded $100,000) (Par. 89); a three-level increase pursuant to Section 2J1.7 (offense while on bail release) (Par. 90); and a two-level increase pursuant to Section 3C1.1 (obstruction) (Par. 93); for an adjusted offense level of 27 (Par. 94).

Defendant objected to the sought two-level increase for "awareness" that the funds were proceeds of illegal activity (Par. 88), the three-level increase for the crimes while on bail (Par. 90), and the 2-level increase for "obstruction of justice" (Par. 93).

Defendant's counsel contended that the Probation Department should have given Petitioner a two-level reduction under Guideline Section 3B1.2(b) to reflect his "minor" role in the offense (Par. 92).

Additionally, a downward departure was sought for Petitioner's "cooperation" in the apprehension, and conviction, of McIntyre, as well as for "extraordinary family circumstances."

The court ruled that the Probation Department should not have imposed a two-level enhancement to Counts Eight through Eleven for "awareness" (Par. 88). Accordingly, the court reduced the total offense level from 27 to 25 recognizing that since Count One charged a conspiracy which required knowledge of theft, the Sentencing Guideline provisions on theft were taken into consideration to avoid possible "double counting."

The court denied the objections to the 3-level increase for offenses committed while on bail release (Par. 90). The court overruled the objection to the two-level increase for "obstruction of justice" (Par. 93), holding that the two points for "obstruction of justice" recognized the obstruction of justice conviction, which is different from money laundering and fraud. Rejecting Petitioner's argument that his role in the offense was "minor," the court explained that although difficult to measure, "role in the offense" is generally determined based upon participation. The court felt it was "difficult to say" that Petitioner's participation was "substantially less" than McIntyre's. The court then curiously explained it could not "second guess" the jury's determination.[2]

Without explanation, the Court denied a downward departure pursuant to U.S.S.G. § 5K2.0 for Petitioner's "cooperation" even though his cooperation led to McIntyre's arrest and conviction. The Court also denied Defendant's

2. Since role in the offense is not a jury issue, we are puzzled by what the court meant by this declination to make an "independent finding."

application for a downward departure for "extraordinary family circumstances" stating that it must "follow" the sentencing guideline scheme, and not to depart, unless there are "peculiar circumstances" which the Sentencing Commission did not take into account .

THE DECISION OF THE COURT OF APPEALS

Petitioner appealed to the Second Circuit Court of Appeals. In a May 13, 1999 summary order (1a), the court affirmed Petitioner's judgment of conviction, but remanded for the limited purpose of considering technical corrections to the judgment of conviction. A motion for rehearing and rehearing *en banc* was denied on June 23, 1999 (15a).

REASONS FOR GRANTING THE WRIT

I.

THE INAPPROPRIATENESS OF THE GOVERNMENT'S QUESTIONING OF PETITIONER WHICH REQUIRED HIM TO CHARACTERIZE LAW ENFORCEMENT AND OTHER WITNESSES AS "MISTAKEN" OR "LYING" IS IN CONFLICT BOTH WITH PRIOR SECOND CIRCUIT AND OTHER CIRCUIT DECISIONS LEADING TO AMBIGUITY

The petition for certiorari should be granted because the decision of the Second Circuit is in conflict with its own well reasoned prior holdings in *United States v. Hestie*, 439 F.2d 131 (2d Cir. 1971); *United States v. Richter*, 826 F.2d 206 (2d Cir 1987) and *United States v. Gaind*, 31 F.3d 73 (2d Cir. 1994), as well as those by sister circuit courts in *Greenberg v. United States*, 280 F.2d 472 (1st Cir. 1960);

United States v. Akitoye, 923 F.2d 221 (1st Cir. 1991); *Scott v. United States*, 619 A.2d 917, 924 (D.C. 1993); *United States v. Boyd*, 54 F.3d 868, 870 (D.C. Cir. 1995).

It is well established that once a defendant takes the stand to testify on his own behalf, he waives his Fifth Amendment right to remain silent. Having done so, a defendant fairly places his credibility into issue. Prior statements allegedly made by witnesses prior to defendant's testimony may be utilized at trial to impeach credibility if demonstrably inconsistent with his testimony (*United States v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979); *United States v. Rice*, 550 F.2d 1264, 1373 (5th Cir.), *cert. denied*, 434 U.S. 954 (1977)).

There are however, well recognized limits to the nature, extent, and tone of cross-examination. The most significant of such recognized limitations relate to the inappropriateness of seeking to have a witness characterize the truthfulness or accuracy of the testimony of their adversary's witnesses.

Thus in *United States v. Richter*, *supra*, the engagement in such tactics resulted in a unanimous reversal of an otherwise legally sufficient case. *See also United States v. Hestie*, 439 F.2d at 132; *Greenberg v. United States*, 280 F.2d at 475 ("It was improper for the prosecutor to phrase questions put to defendant on cross-examination in such a way as to force defendant to characterize prosecution witnesses as liars").

This judicial recognition is found in decisions in outside circuits as well (*e.g.*, *Greenberg v. United States*, *supra*; *Scott v. United States*, *supra*; *United States v. Boyd*, *supra*).

In fact, a number of State courts have also recognized the concern for leaving credibility issues to jurors rather than witnesses, also holding "were they lying" questions improper (*see State v. Casteneda-Perez*, 810 P.2d 74, 78-79 (Wash. Ct. App. 1991); *State v. Flanagan*, 801 P.2d 675, 679 (N.M. Ct. App. 1990)). As recently as this past June the Supreme Court of Minnesota recognized the inappropriateness of such questions, although finding due to circumstances inapplicable to the instant case that the defendant "opened the door" to the line of questioning (*State v. Pilot*, 65 Criminal Law Reporter 277-278 (6/16/99)).

In *Richter*, the Second Circuit held that "[d]eterminations of credibility are for the jury. . . . not the witnesses, . . . [p]rosecutorial cross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper" (*Richter*, 826 F.2d at 208; *see also United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988)) (credibility of witnesses is exclusively for jury determination, and witnesses may *not* opine as to the credibility of other witnesses trial testimony). Yet, while acknowledging the dangerousness of the Government's tactics in the case at bar, and the patent unfairness of such tactics, the court declined to remand for a new trial. More recently, however, in *United States v. Sanchez*, 176 F.3d 1214, 1218-1222 (9th Cir. 1999) the Ninth Circuit reversed a conviction where this cross-examination tactic was utilized.

An issue of this significance ought not turn on whether the term "liar" was forced upon the testifying witness. Rather, it should focus on the substantive meaning of the testimony that is elicited by the Government as perceived by a reasonable trial juror. This is we submit especially true when

the witness is the defendant[3]. The need for national uniformity on this issue of trial practice is important to the protections of defendants, in order to ensure that citizens throughout the nation are granted a fair trial.

II.

THE COURT'S FAILURE TO RECOGNIZE ITS POWER TO DEPART FOR EXTRAORDINARY RATHER THAN ABERRATIONAL FAMILY CIRCUMSTANCES

This Court's last discussion of the power of sentencing judges to downwardly depart was *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035 (1996). In *Koon*, the Court held that District Judges are given wide authority to downwardly depart for all but "forbidden" factors (18 U.S.C. § 3553(b), Sentencing Guidelines § 1B1.1).

The vacatar in *Koon* was we submit, not limited to factors involved in the well publicized "Rodney King" case (*see, e.g., Meza v. United States*, __ U.S. __, 117 S. Ct. 478 (1996), *vac.*, 76 F.3d 117 (7th Cir.), involving sentence disparity among co-defendants; *but see*, *United States v. Meza*, 127 F.3d 545 (7th Cir. 1996)).

In the case at bar, the basis for a downward departure, "extraordinary family responsibilities," provided a similar non-forbidden basis for *nisi prius* discretion (*see, e.g., United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991), *accord United*

3. A defendant who testifies, and made to appear to have dissembled is we submit more likely to be convicted, even if there may be a reasonable doubt as to guilt, simply because of the tendency to infer that a witness perceived as less than candid will be thought to be "hiding something," and guilty of the offense charged.

States v. Ekhator, 17 F.3d 53, 55 (2d Cir. 1994), *but cf. United States v. Wilson*, 114 F.3d 429 (4th Cir. 1997); *United States v. Hendriex*, 29 F.3d 953, 961 (5th Cir. 1994); *United States v. Cacho*, 951 F.2d 308, 311 (11th Cir. 1992)). However, as with all powers of departure, the *sine quo non* of departure is an *accurate awareness* of both the existence, and scope, of the departure power available. (*See* 18 U.S.C. § 3742(f)(1)).

Unrecognized, or erroneously exercised power, unfairly robs the defendant of the type of focused sentencing important to insure that the mandate of 18 U.S.C. § 3553 is met — e.g. that the sentence is jurisprudentially adequate, but not excessive, and that compelling sentencing considerations are implemented. In fact it is such an important issue that a court's failure to properly perceive its powers under the Sentencing Guidelines is recognized in all circuits as one of the sole basis for appellate review (*see, e.g., United States v. Russell*, 810 F.2d 18 (1st Cir. 1989)); *United States v. Howard*, 902 F.2d 894, 895-896 (11th Cir. 1990); *United States v. Bayerle*, 898 F.2d 28, 31 (4th Cir. 1990); *United States v. Sammoury*, 74 F.3d 1341 (D.C. Cir. 1996)).

Furthermore, such a failure has been recognized as a valid reason to vacate a sentence, and remand to the district court for re-sentencing (*see United States v. Trzaska*, 859 F.2d 118, 121 (2d Cir. 1988)). Clearly, the Second Circuit's decision in the case at bar conflicts not only with its own prior decisions, but with those of other circuits as well (*see, United States v. Scott*, 74 F.3d 107 (6th Cir. 1996); *United States v. Gavaria*, 116 F.3d 1498 (D.C. Cir. 1997), *reh'g denied, cert. denied*, 118 S. Ct. 865 (1997); *United States v. Thomas*, 49 F.3d 253 (10th Cir. 1998)).

As this Court has moved to provide structure to the Guidelines, it has spoken to the nature and quality of the proof which can be considered (*United States v. Watts*, __ U.S. __, 117 S. Ct. 633 (1997) (upholding use at sentencing of acquitted conduct)), but has not addressed either to the level of a District Judge's awareness, or as here, the consequence of application of an erroneous sentencing standard (perceived here as "aberrational" when what was required was only "extraordinary").

The question whether a Judge has exercised sentencing discretion, is a question of law (*Koon v. United States*, 518 U.S. at 98-102). The Second Circuit has recognized that, where the remarks of a Sentencing Judge are ambiguous (*see United States v. Trzaska*, *supra*, at 121, the appropriate course for this Court to follow is not to engage in speculation, or guesswork, but rather to remand the case for re-sentencing (*United States v. Montez-Gaviria*, 163 F.3d 697, 703 (2d Cir. 1998); *accord United States v. Fagan*, 162 F.2d 1280, 1282-1285 (10th Cir. 1998); *United States v. Sharpsteen*, 913 F.2d 59, 63 (2d Cir. 1991); *United States v. Califano*, 978 F.2d 65, 66 (2d Cir. 1992)).

Here, beyond the patent ambiguity of the District Court's remarks, the Court clearly indicated that the circumstances upon which departure was sought were required to be of an "aberrational" nature, and not merely "extraordinary" (i.e. not ordinary). The law, of course, is that family responsibilities need not be "aberrational" in nature (*see, e.g., Zecevic v. U.S. Parole Commission*, 163 F.3d 731 (2d Cir. 1998)), but only not ordinary (*see also United States v. Sharpsteen*, *supra*, at 63).

Where, as here, the Sentencing Judge's comments at a minimum required clarification, the appropriate course is to remand for further proceedings (*see, e.g., United States v. McCall*, 174 F.3d 47 (2d Cir. 1998)). We respectfully submit that such a course is particularly appropriate here, particularly in light of the Courts' broadened post-*Koon* perspective on what could constitute "aberrational" conduct of a degree supportive of a post-*Koon* downward departure (*see, e.g., Zecevic, supra*).

III.

THE COURT'S MISPERCEPTION THAT THE ABSENCE OF A MOTION BY THE GOVERNMENT FOR DOWNWARD DEPARTURE REQUIRED A REMAND

Petitioner contended before the Court of Appeals that the sentencing Judge misperceived her power to downwardly depart to impose a lesser sentence to reflect Petitioner's cooperation with federal law enforcement. The Government hewed to the view that Guideline Section 5K1.1 is the *only* Guideline upon which the *nisi prius* court can look to for a downward departure for cooperation. We disagree (*cf. Wade v. United States*, 504 U.S. 181, 185-186 (1992)).

The District of Columbia Circuit in *In re Sealed Case*, 149 F.3d 1198, 1201-1204 (D.C. Cir. 1998) had initially revised its view of the virtually unreviewable, strongly held power which prosecutors have over quantifying cooperation for sentencing purposes, as did the Fifth Circuit in *United States v. Solis*, 161 F.3d 281, 284-285 (5th Cir. 1998). Both courts subsequently vacated their original holdings. (*See In Re Sealed Case*, 181 F.3d 128 (D.C. Cir. 1999)).

Thus, the question remains whether, subsequent to *Koon*, Guideline Section 5K2.0 provides an additional appropriate jurisdictional Guideline predicate, rooted where factually appropriate, for departure, where a § 5K1.1 application by the Government is not forthcoming, but for reasons not triggered by *Wade*.

Experienced Judges should not be solely, and totally dependant upon the whims of a young prosecutor, in determining whether cooperation worthy of some sentence reduction is appropriate (*but cf. United States v. Abuhouran*, 161 F.3d 206, 209-217 (3d Cir. 1998)).

Where, however, as here, Petitioner was debriefed, and cooperated to a level which unquestionably resulted in the arrest of the insider thief, Cornell McIntyre, the inequitable posture of being deprived of *any* possible departure by virtue of an unauthorized trip to Jamaica, is harsh indeed. Clearly, the Court should have been able to ameliorate the sentence by giving such credit as she felt was appropriate, and not been *solely* prevented by the United States Attorney's Office's *ipsi dixit*.

CONCLUSION

The writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

ROGER BENNET ADLER
Counsel of Record
FAITH A. FRIEDMAN
ROGER BENNET ADLER, P.C.
Attorneys for Petitioner
225 Broadway
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New York, New York 10007
(212) 406-0181

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 13, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of May one thousand nine hundred and ninety-nine.

PRESENT:

José A. Cabranes,
Robert D. Sack,
Circuit Judges,
Milton I. Shadur,*
District Judge.

No. 98-1287

UNITED STATES OF AMERICA,

Appellee,

– v. –

AUSTIN HUTCHINSON,

Defendant-Appellant.

* * *

---

* Of the United States District Court for the Northern District of Illinois, sitting by designation.

Appendix A

Appeal from the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED, and the cause is REMANDED for the limited purpose of considering technical corrections to the judgment of conviction.

Austin Hutchinson appeals from a judgment of conviction entered by the district court following a jury's verdict of guilty on one count of conspiracy to transport stolen funds in foreign commerce, in violation of 18 U.S.C. § 371; four counts of using criminally-derived property to engage in monetary transactions, in violation of 18 U.S.C. § 2314; four counts of contempt of court, in violation of 18 U.S.C. § 401(3); one count of obstruction of justice, in violation of 18 U.S.C. § 1503; and two counts of submitting false documents to the government, in violation of 18 U.S.C. § 1001. The district court imposed a sentence that included 57 months of imprisonment and an order of restitution in the amount of $4,094,657, payable in installments of 10% of Hutchinson's gross monthly income. In this appeal, Hutchinson asserts that the government engaged in impermissible cross-examination of him at trial and raises various challenges to the sentence imposed by the district court.

First, Hutchinson argues that the government's cross-examination of him ran afoul of our holding in *United*

States v. Richter, 826 F.2d 206 (2d Cir. 1987). In that case, we reversed a conviction due, *inter alia*, to a series of cross-examination questions in which the government noted the divergent testimony of an FBI agent and challenged the defendant to testify that the agent "was either mistaken or lying." *Id.* at 208. In subsequent cases, we have made clear that the government is not precluded from "[a]sking a witness whether a previous witness who gave conflicting testimony is 'mistaken,' " but only from "requiring the witness to condemn the prior witness as a purveyor of *deliberate falsehood, i.e.*, a '*liar*.' " *United States v. Gaind*, 31 F.3d 73, 77 (2d Cir. 1994). In the instant case, the record does not reveal any cross-examination questions challenging the defendant to brand any witness a "liar." Instead, Hutchinson was asked whether certain testimony, if given, "would be wrong," "wouldn't be right," "wouldn't be true," or "would surprise" him. At very most, Hutchinson was permissibly asked to state that other witnesses' testimony was false; the prosecutor did not overreach here by asking him to testify that any such falsehoods had been "deliberate," *Gaind*, 31 F.3d at 77. At the same time, we are troubled by what appears to be a tendency to skate as close to the edge as may be permissible. Good prosecutorial practice would seem to call for a less problematic (and hence less risky) approach.

Second, Hutchinson argues that the district court erred in refusing to depart downward on account of family circumstances. Such refusals to depart are generally unappealable, unless " 'the guidelines were misapplied, the court misapprehended its authority or imposed an illegal sentence.' " *United States v. Brown*, 98 F.3d 690, 692 (2d Cir. 1996) (quoting *United States v. Haynes*, 985 F.2d 65,

68 (2d Cir. 1993)). We indulge "a strong presumption that a district judge is aware of the assertedly relevant grounds for departure. This presumption is overcome only in the rare situation where the record provides a reviewing court with clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority." *Id.* at 694. Judge Cedarbaum clearly recognized that a defendant's family circumstances will sometimes allow for downward departure, but concluded those described by Hutchinson were not sufficiently "aberrational" to warrant departure. Not only has appellant failed to demonstrate that the district court misapprehended the scope of its discretion, but he has failed to articulate any circumstances that might plausibly justify a downward departure. *Cf. United States v. Tejeda*, 146 F.3d 84, 87-88 (2d Cir. 1998) (holding that defendant had not shown an "exceptional hardship" necessary to permit a departure for family circumstances, and thus vacating departure that had been predicated on, *inter alia* family circumstances); *United States v. Galante*, 111 F.3d 1029, 1034 (2d Cir. 1997) (family circumstances "are a discouraged basis for departure because the Commission has deemed them to be not generally relevant.")

Third, Hutchinson argues that he was entitled to a downward departure for cooperating with the government, because the government acted in bad faith when it refused to move for such a departure pursuant to U.S.S.G. § 5K1.1. This not a case, however, in which the defendant's cooperation was governed by an agreement mentioning a possible 5K1.1 motion. Instead, Hutchinson never entered into an agreement to cooperate or to plead guilty. We have held that "[i]n the absence of a plea agreement, a court may

review the prosecutor's decision whether to file a 5K1.1 motion only to determine whether it was based on an unconstitutional motive." *United States v. Leonard*, 50 F.3d 1152, 1157 (2d Cir. 1995). Hutchinson does not assert any unconstitutional motive on the part of the government, and this claim of error thus lies beyond the scope of our review.

Fourth, Hutchinson asserts that the district court erred in failing to accord him an offense-level reduction for his purportedly "minor" role in the offense. *See* U.S.S.G. § 3B1.2. The record does not support Hutchinson's assertion that he played only a minor role.

Finally, Hutchinson argues that, in imposing restitution, the district court erred by failing to explicitly advert to his financial obligations to his dependents — one of the factors that 18 U.S.C. § 3664(f) requires the Court to consider in fashioning the restitution award. We have held that "a district judge need not make specific findings with respect to this factor, but the record must reflect that the court did consider it." *United States v. Conhaim*, 160 F.3d 893, 896 (2d Cir. 1998) (internal quotation marks omitted) (citing *United States v. Giwah*, 84 F.3d 109, 114 (2d Cir. 1996)). In particular we have stated that the record must include an "affirmative act or statement allowing an inference *that the district court in fact considered the defendant's ability to pay*." *United States v. Soto*, 47 F.3d 546, 551 (2d Cir. 1995) (citation omitted; emphasis added). Here, Judge Cedarbaum did specifically state that "I must take into consideration and I do take into consideration the defendant's ability to pay." This statement suffices to demonstrate the district court's consideration of the applicable factors. *See id.*

Appendix A

Quite apart from the arguments raised by Hutchinson in this appeal, the government's brief notes possible technical defects in the judgment of conviction — namely, its omission of certain details of the restitution order announced by the district court at sentencing. The government also represents that it has brought this issue to the district court's attention in a letter filed simultaneously with its appellate brief. At oral argument, the government stated that it would have no objection to a remand to the district court for the limited purpose of considering these technical corrections to the judgment of conviction. In an abundance of caution, we will remand for that purpose.

For the foregoing reasons, we **AFFIRM** the judgment of the district court and **REMAND** the cause for the limited purpose of considering the technical corrections to the judgment of conviction identified by the government.

For the Court,
Karen Greve Milton, Acting Clerk

By: s/ Lucille Carr

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED NOVEMBER 19, 1998

United States District Court

Case Number: S3 96 CR 00738-01-MGC

UNITED STATES OF AMERICA

v.

AUSTIN HUTCHINSON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

AUSA: PETER C. SPRUNG and MORRIS PANNER
DEFENDANT'S ATTORNEY: BARRY TURNER

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 after a JURY TRIAL

Appendix B

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	CONSP. TO TRANSPORT STOLEN FUNDS IN FOREIGN COMMERCE	Nov. 30, 1993	1
18 USC 1957(a) and 2	MONETARY TRANSACTIONS	Dec. 18, 1995	8, 9, 10 & 11
18 USC 401(3), 3147 and 2	CONTEMPT	May 6, 1996	12, 13, 14 & 15
18 USC 1503, 3147 and 2	OBSTRUCTION OF GRAND JURY INVESTIGATION	Jan. 31, 1996	16
18 USC 1001, 3147 and 2	SUBMITTING FALSE DOCUMENTS TO THE GOVERNMENT	April 30, 1996	17 & 18
18 USC 401(3), 3148(a) and 2	CONTEMPT	May 6, 1996	19

Appendix B

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 2, 3, 4, 5, 6, and 7 ORIG INDICT.96 CR 738-DISMISSED and INDICT.SS96 CR 738 DISMISSED

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
071-64-6483

MAY 21, 1998
Date of Imposition of Judgment

Defendant's Date of Birth:
November 2, 1957

Defendant's USM No.:
42828-054

s/ Miriam Goldman Cedarbaum
Signature of Judicial Officer

Defendant's Residence Address:
1369 TANWOOD DRIVE
BALDWIN, NEW YORK
11510

HON. MIRIAM GOLDMAN CEDARBAUM USDJ 0878
Name & Title of Judicial Officer

Appendix B

Defendant's Mailing Address:
1369 TANWOOD DRIVE
BALDWIN, NEW YORK
11510

November 19, 1998
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of FIFTY-SEVEN (57) MONTHS on Counts 1, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 to run CONCURRENTLY with each other.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 YEARS

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Appendix B

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

Appendix B

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

Appendix B

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 1,300.00	$	$ 4,094,657.00

* * *

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): with respect to 2 point enhancement for knowledge of theft.

Appendix B

Guideline Range Determined by the Court:

Total Offense Level: 25

Criminal History Category: I

Imprisonment Range: 57 to 71 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 12,500.00 to $ 125,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 4,094,657.00

* * *

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 23, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of June one thousand nine hundred and ninety-nine.

Dkt No: 99-1287

USA

Appellee,

v

Hutchinson

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Austin Hutchinson.

Appendix C

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney